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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 970

DAVID CRYSTAL, INC.,

Petitioner,

—against—

THE CUNARD STEAM-SHIP COMPANY LIMITED,

Respondent,

—and—

JOHN T. CLARK & SON,

Respondent-Impleaded,

—and—

PENSON & COMPANY,

Respondent-Impleaded.

PETITION OF DAVID CRYSTAL, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, David Crystal, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit but only in so far as it was denied a direct recovery against the respondent-impleaded John T. Clark & Son.

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York is reported in 223 F. Supp. 273, and a copy thereof is appended hereto.

The opinion of the Court of Appeals for the Second Circuit is reported in 339 F. 2d 295, and a copy thereof is appended hereto.

Judgment

The judgment sought to be reviewed is the judgment of the Court of Appeals for the Second Circuit and is dated December 9, 1964, and was entered on December 9, 1964.

Jurisdiction

The jurisdiction of this Court is founded on 28 U.S.C.A., Section 1333, and United States Supreme Court Admiralty Rule 56.

Question Presented

The question presented by petitioner is whether the judgment or decree granting it recovery against the respondent, The Cunard Steam-Ship Company Limited, should not also have granted it direct recovery against the respondent-impleaded, John T. Clark & Son.

Statement of the Case

Petitioner, David Crystal, Inc., is referred to hereafter as "Crystal".

The respondent, The Cunard Steam-Ship Company Limited, is referred to hereafter as "Cunard".

The respondent-impleaded, John T. Clark & Son, is referred to hereafter as "Clark".

The petitioner, Crystal, was the ultimate consignee of 28 cases of shirts carried from France to the Port of New York by Cunard aboard its steamship "Trelyon". Clark was the contract stevedore and terminal operator for Cunard and discharged the 28 cases of shirts on to a pier in its terminal in Brooklyn. Thereafter Clark misdelivered the 28 cases of shirts to parties other than the petitioner, Crystal, the ultimate consignee. The cases of shirts were never recovered or delivered to the petitioner, Crystal.

Crystal brought suit in admiralty in the United States District Court, Southern District of New York against Cunard to recover the value of the cases of shirts. Cunard, under United States Supreme Court Admiralty Rule 56, impleaded Clark, its stevedore and terminal operator, asking recovery over against it for any sums it might be held liable to pay petitioner, Crystal. Clark then impleaded Penson & Company, the customs brokers that had cleared the shipment on arrival, asking recovery over against Penson & Company for any sums it might be held liable to pay Cunard.

Petitioner then filed an amendment to its libel asking direct recovery also against Clark and Penson & Company.

The District Court granted petitioner full recovery against Cunard and granted Cunard in turn full recovery over against Clark. The District Court, however, did not grant petitioner, Crystal, direct recovery also against Clark. And, the Court of Appeals also failed to grant petitioner, Crystal, direct recovery against Clark, although it did affirm unanimously the recovery granted petitioner, Crystal, against Cunard.

It is petitioner's, Crystal, contention on this petition for a writ that the District Court and the Court of Appeals both erred in not granting petitioner, Crystal, a direct recovery against Clark. United States Supreme Court Admiralty Rule 56 clearly and unquestionably provides for such a recovery and authorizes such a recovery. That rule reads:

> **"Rule 56. Right to bring in party jointly liable**
>
> In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and

that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

Cunard was held liable to petitioner for this loss because of the acts of its stevedore and terminal operator, Clark, in making the misdelivery. This act of Clark casting Cunard in liability to petitioner equally cast Clark in liability directly to petitioner. But despite the language of Rule 56, that after a party has been impleaded,

> "* * * Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded

> against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain."

the District Court, nevertheless, after granting petitioner recovery against Cunard, denied petitioner recovery against Clark, stating merely,

> "In view of the foregoing there is no need to consider the direct claim of Crystal against Clark."

The Court of Appeals likewise considered the question of the right of petitioner, Crystal, to recover directly against Clark as "academic" in view of the recovery awarded petitioner against Cunard.

It was necessary that the District Court and the Court of Appeals consider the issues between petitioner, Crystal, and Clark, and these issues were not made "academic" by reason of the recovery given petitioner, Crystal, against Cunard. And it remains necessary that consideration be given these issues and that petitioner, Crystal, be given a recovery directly against Clark for the following simple reason—should this Court reverse the holding in favor of petitioner, Crystal, against Cunard, or modify that holding, petitioner will be left without a determination of the issues as between it and Clark and without a full recovery for its loss. This clearly gives rise to the need for the judgment to be changed to give peti-

tioner, Crystal, a direct recovery against Clark. Petitioner, Crystal, is clearly and unquestionably entitled to such recovery, for, as pointed out earlier, the very acts of Clark casting Cunard in liability to petitioner also casts Clark in liability directly to petitioner.

The right of petitioner, Crystal, to recover directly against Clark cannot be questioned:

Charles Gural v. *Terry Contracting Inc.*, 178 F. Supp. 766:

> "The libellant is entitled to a decree directly against the respondent-impleaded L & J. 56th Rule in Admiralty, 28 U.S.C.A., 2 Benedict on Admiralty, sec. 351, p. 538; The Pennsylvania Railroad Company vs. The S. S. Beatrice, D.C. S.D.N.Y. 1958, 161 F. Supp. 136."

This is a suit in admiralty and the basis for federal jurisdiction in the District Court, the Court of first instance, is Title 28, U.S.C.A., Section 1333, subdivision (1), which reads:

> "**§ 1333. Admiralty, maritime and prize cases**
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Petitioner, Crystal, is Compelled to File This Writ

Petitioner, Crystal, is presently entitled to recover its loss in full from Cunard. There is no question as to the solvency of Cunard or its ability to pay the award granted petitioner. Had petition for a writ not been made to this Court by Cunard or Clark, this petition would, of course, not have been filed by petitioner. Should this Court grant the petition of one of the other parties to this litigation, this petition by petitioner, Crystal, should be granted in order that it may be accorded relief against Clark in the event its present award against Cunard is altered or modified.

Conclusion

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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Opinion, Findings of Fact and Conclusion of Law of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 196–110

DAVID CRYSTAL, INC.,

Libellant,

—against—

THE CUNARD STEAM-SHIP COMPANY LIMITED,

Respondent Petitioner,

and

JOHN T. CLARK & SON,

Respondent-Impleaded Petitioner,

and

PENSON & COMPANY,

Respondent-Impleaded.

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Opinion, Findings of Fact and Conclusions of Law of District Court

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LEVET, *D. J.*

This action in admiralty, brought by the libellant, David Crystal, Inc. (Crystal), seeks to recover the value of twenty-eight of its shipment of twenty-nine cases of shirts transported by the respondent, Cunard Steam-Ship Co. (Cunard), pursuant to an ocean bill of lading consigning the goods to Crystal's customs broker in New York, Penson & Company (Penson).

The original libel asserted a cause of action against Cunard for non-delivery of twenty-eight of the twenty-nine

cases of shirts. Cunard in its answer denied the material allegations of the libel and asserted the affirmative defenses of limited liability under both The Carriage of Goods by Sea Act, 46 USC § 1304(5) and the terms of the bill of lading. At the same time Cunard, pursuant to Admiralty Rule 56, impleaded its stevedore, John T. Clark & Son (Clark), seeking "full liability over and indemnity" for alleged breach of its stevedoring and terminal operating contract. Clark answered both Cunard's impleading petition and the libel by denying the principal allegations of both and asserting the affirmative defense of delivery and limited liability. Clark thereafter impleaded the libellant's customs broker Penson, alleging negligence and seeking "full liability over * * * and indemnity." Penson answered both the libel and the impleading petition denying the material allegations in each and asserting as affirmative defenses complete exoneration and limitation of liability resulting from the terms of its contract with the libellant.

It was in this posture that the pleading stood, save for certain amendments by Cunard and Penson, until the completion of the trial, when libellant asked, and was granted, permission to amend its libel to conform to the proof. The resulting amended libel asserted for the first time direct claims against Clark for negligence and Penson for breach of contract and conversion and a second cause of action against Cunard for conversion. Cunard, Clark and Penson all filed exceptions to the amended libel. By memorandum decision, dated June 6, 1963, I overruled the exceptions to the direct claims against Clark and Penson but sustained Cunard's exception to the second cause of action for conversion. The jurisdictional questions raised by the amended libel as well as those raised by the original pleadings were to be determined after submission of

further briefs and proposed findings of fact keyed to the testimony and proof.

After hearing the testimony of the parties, examining the exhibits, the pleadings, the briefs and proposed findings of fact and conclusions of law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law pursuant to Admiralty Rule 46½.

Findings of Fact

1. At all times herein pertinent, David Crystal, Inc. was and is a corporation organized and existing under the laws of the State of New York with an office and place of business in the County, State and City of New York.

2. At all times herein pertinent, the respondent-petitioner, Cunard Steam-Ship Co. Ltd., was and still is a corporation organized and existing under the laws of the United Kingdom with its principal place of business in Liverpool, England, and an office and place of business in the City, County and State of New York.

3. At all times herein pertinent, respondent-impleaded petitioner, John T. Clark & Son, was and still is a corporation organized and existing under the laws of the State of New York with an office and place of business in the City, County and State of New York.

4. At all times herein pertinent, respondent-impleaded, Penson & Co., was and is a co-partnership of Harvey Penson, Jack Penson and Louis Penson, doing business under the name Penson & Company, with an office and place of business in the County, State and City of New York.

Opinion, Findings of Fact and Conclusions of Law of District Court

5. On October 31, 1957 at Le Havre, France, 29 cases of shirts owned by libellant were received in good order and condition by Cunard for shipment, freight prepaid, aboard Cunard's vessel, SS Trelyon.

6. Penson was the named consignee in the bill of lading (Lib. Ex. 1) and was acting as Crystal's customs broker with regard to this shipment. Crystal as owner of the shipment, was the real party in interest, and has standing to bring this action.

7. The 29 cases of shirts were carried by Cunard aboard the SS Trelyon from Le Havre, France, to New York, N.Y., between October 31, 1957 and November 14, 1957.

8. On November 4 or 5, 1957, prior to the arrival of the vessel, Penson received by air mail from the shipper, W. Wingate & Johnson, two original consolidated bills of lading and several copies of the consular and commercial invoices pertaining to this shipment.

9. Upon receipt of these documents, Penson's documents department prepared a folder for this shipment in which were kept all documents pertaining thereto. (Penson Ex. 1) Prior to November 14, 1957, Penson prepared the United States Customs Consumption Permit and submitted it, together with a duplicate original bill of lading, to U.S. Customs. After approval by Customs, the duty was paid by Penson and the entry permit was validated on November 12, 1957. The validated entry permit was forwarded by government messenger on November 14, 1957 to U.S. Customs, Pier 2, Bush Terminal.

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10. On November 13, 1957, Cunard mailed to Penson a notice that the SS Trelyon would arrive at Pier 2, Bush Terminal, Brooklyn, on November 14, 1957. This notice was received by Penson on November 14, 1957.

11. Penson endorsed one of the duplicate original bills of lading (Lib. Ex. 1) and presented it to Cunard's Inward Freight Department on November 14, 1957.

12. After receiving the endorsed bill of lading, Cunard advised its terminal operator, Clark, by telephone on November 14, 1957 that all freight had been received and that it was in order to release the goods to the consignee, Penson, upon presentation of Penson's delivery order to Clark.

13. On November 15, 1957, the 29 cases of shirts were discharged from the SS Trelyon in the same good order and condition as shipped and were landed by employees of John T. Clark & Son on the dock at Pier 2, Bush Terminal.

14. Case No. 92 containing 420 shirts was delivered to Public Stores for Customs inspection and the remaining 28 cases were segregated by employees of John T. Clark & Son and kept together on Pier 2, Bush Terminal, Brooklyn, New York, on November 15, 1957.

15. Clark acted as stevedore and terminal operator at Pier 2, Bush Terminal, Brooklyn, pursuant to a written contract with Cunard (Lib. Ex. 4) and undertook to deliver the cargo unloaded from the SS Trelyon to the named consignee in the bill of lading upon receiving advice from Cunard that all freight charges had been paid.

16. On November 14, 1957, after receiving the arrival notice from Cunard and completing clearance of the shipment through Customs, the shipment folder was given to Penson's traffic clerk, Jose Perez, who prepared and signed a delivery order naming Arrow Carriers, one of several trucking firms employed by Penson, as the trucking company to accept delivery of the shirts at the pier. The completed delivery order was to be mailed to Arrow Carriers. As was the custom and practice at Penson, after Perez had signed the delivery order, he marked the shipment folder (Penson Ex. I) to indicate that the delivery order had been mailed on November 14, 1957. He then placed the completed delivery order on the outside of the shipment folder and allowed perhaps five or ten folders to accumulate before placing the delivery orders in the mail basket to await a pick-up by the mail clerk.

Shortly after Perez had signed the delivery order it was surreptitiously taken from Perez' desk by another Penson employee, Louis Segarra, when Perez momentarily stepped away. Segarra also took a blank delivery order and delivered both the original and the blank to one Arthur Schwartz, a former employee of Penson. All of these actions were pursuant to a conspiracy to effectuate a misdelivery of the Crystal shipment in which the co-conspirators were, in addition to Segarra and Schwartz, Andrew Rigley, Salvatore Orlando and Anthony Garite. The only Penson employee among the conspirators was Segarra. In further pursuance of the plan, Schwartz handed the original and blank delivery order to Rigley, who thereupon copied the information from the completed delivery order to the blank form and inserted the name of a fictitious trucking company, C&L Trucking Co., in the place of Arrow Carriers. Another confederate, Orlando, forged Perez' signature to the delivery order.

Rigley then destroyed the original. Segara and Schwartz were given a ring for their participation in the conspiracy.

17. Perez did not physically determine that the order actually was mailed or that the mailroom clerk picked it up. (352, 411) Penson kept no mail book and the only record that the completed delivery order had been sent out was the notation on the shipment folder (Penson Ex. I) which was placed thereon when Perez had signed the delivery order. Perez did not see Segarra take the completed delivery order from his desk and did not discover its absence, or diversion, until November 21, 1957, as he assumed in the normal course of the procedure the delivery order had been picked up by the mail clerk and mailed to Arrow Carriers.

18. Rigley and Orlando obtained a truck from another confederate, Garite, and two days before November 15, 1957, repainted the doors of the truck, thereby obliterating the name "M&S Trucking." At approximately 7:20 A.M. on November 15, Rigley painted on the doors of the truck the name of the fictitious trucking company, "C&L Trucking." The license plates on the truck had previously been stolen. There were no Customs House marks on the truck and none were required to gain access to the pier.

19. On November 15, 1957, Rigley and Orlando arrived at approximately 7:30 A.M. at Pier 2, Bush Docks, and parked their truck outside the pier. Rigley first went to the pier gateman and obtained a pier pass listing the name and license plate number of his truck. (Clark Ex. B) No request was made by the gateman to see the registration for the truck. Rigley then went to the chief

delivery clerk, William Keane, a Clark employee, and presented the forged delivery order. The delivery clerk marked the delivery order with an order number and compared the bill of lading number on the delivery order with that in the delivery book to ascertain whether the freight had been paid. The delivery book, composed from a duplicate manifest given Clark by Cunard prior to the arrival of the vessel, listed all of the ship's cargo. He then checked the consignee and the type of Customs permit involved. Satisfied that all was in order, he entered in the delivery book the name of the truckman and the number of packages he was to pick up. (Cunard Ex. C) The delivery clerk then attached the gate pass to the delivery order and handed it to Rigley to present to the U.S. Customs representative on the pier. The Customs representative checked that all was in order and placed the customs stamp on the delivery order and indicated that case No. 92 was to be placed in public stores. Rigley then took the delivery order and gate pass to the dock boss, who assigned a checker, Albert Scarabino, and gave him the delivery order and the gate pass. Scarabino first checked to determine whether the license plate number on the gate pass coincided with that on Rigley's truck. Determining that it did, at approximately 3:30 or 4:00 P.M., the 28 cases of shirts were loaded aboard the truck by stevedores and tallied by Scarabino. After completing his tally, Scarabino signed the gate pass, the tally sheet (Clark Ex. A) and the reverse side of the delivery order (Lib. Ex. 5) and returned them to Rigley. Rigley then returned to the U.S. Customs representative, who stamped the original tally sheet and returned it to him and retained the duplicate. Rigley then returned to the chief delivery clerk, Keane, and surrendered the tally sheet, delivery order and gate

pass. Keane then posted the date, the truck number and the number of cases delivered in the delivery book alongside the bill of lading number. Rigley's accomplice, Orlando, signed the delivery book with a fictitious name, acknowledging receipt of the cargo. An assistant delivery clerk made out a loading ticket, a copy of which, together with the gate pass, was given to Rigley, who surrendered them to the gateman as he left the pier. The shirts were then sold by the thieves to a "fence."

20. No one at the pier asked Rigley for personal identification nor did anyone question the newly painted doors of the truck or the even more recently painted lettering.

21. Prior to November 15, 1957, Keane had not heard of C&L Trucking, although he was familiar with the names of many of the trucking companies which regularly called at the piers. In the past he had, but very seldom, questioned trucks at the pier with which he was not familiar. (211-12) November 15, 1957 was the first time Keane had ever seen a delivery order naming C&L Trucking, but he made no inquiry or check of any kind.

22. Keane could not read the signature on the delivery order (Lib. Ex. 5) and he made no attempt to verify it. He was given no instructions by Clark as to what to do if he was unable to read the signature.

23. It was the practice in 1957, if a question arose concerning the delivery order, to call the customs broker. Keane did not call in this instance.

24. Prior to the time when the 28 cases of shirts left Pier 2, Bush Terminal, John T. Clark & Son's delivery

clerk ascertained from the permit issued by U. S. Customs that Penson & Company's representative was a proper party to accept delivery of the shirts.

25. The gate pass (Clark Ex. B), given by Rigley to Scarabino, the checker, bore the printed notation:

"Gate Pass
"Pier 25, N.Y.D., Brooklyn"

There is no evidence to show that this was forgery or that this gate pass was not the one given to Rigley by the Pier 2, Bush Terminal gateman. Similarly, the tally sheet (Clark Ex. A) contained the printed notation:

"Piers 92, 90, North River"

The evidence shows that in spite of its printed notation, this tally sheet was the one used at this pier, for this vessel, on this date, and was in fact signed by Scarabino.

26. Neither Penson nor Crystal ever received the 28 cases of shirts.

27. All persons on the pier with whom Rigley dealt were employees of Clark with the exception of the gateman and the Customs representative.

28. On November 19, 1957, Harvey Penson received a call from Crystal that the goods had not yet been delivered. On the same day, Perez, at H. Penson's direction, called Arrow Carriers to inquire and was informed they had not as yet received the delivery order and bills of lading. They requested a duplicate set of inland bills of lading and delivery orders be sent to them. The duplicate set of papers was delivered by hand on November

19, 1957. On November 21, 1957, Crystal called again, saying that they had not yet received the shipment. Perez then called the pier and was told the shipment had been delivered to C&L Trucking Co. On November 21, 1957, H. Penson and Perez went to the pier and examined the signatures on the delivery order (Lib. Ex. 5) and in the delivery book (Cunard Ex. C). Perez examined the delivery order (Lib. Ex. 5) but did not immediately recognize that the signature on the delivery order was not his and it was not until he examined it closely and saw the substitution of C&L Trucking for Arrow Carriers that he discovered it was a forgery. (408)

29. Clark never requested, nor did Penson ever file with Clark, either a list of its partners or employees authorized to sign delivery orders or truckmen authorized by Penson to take delivery in its behalf.

30. It was not customary for customs brokers to file signature cards of persons authorized to sign delivery orders (201) or a list of truckers authorized to receive cargo in their behalf. Similarly, it was not customary for terminal operators, such as Clark, to maintain a list of authorized signatures of freight forwarders or a list of approved trucking companies hired by freight forwarders or consignees. In Keane's experience since 1919, several firms had filed signature cards, but none had done so within the recent past.

31. It was a customary practice at Penson for all employees to have access to the shipment folders, even when on the desk of the traffic clerk Perez and after a delivery order had been signed. Should the folder be removed with Perez' permission after the delivery order had been

signed, Perez personally saw to it that the completed delivery order was mailed that day. All delivery orders signed on any day were either mailed or were called for by the truckers and none were allowed to remain overnight.

32. Blank delivery orders were unnumbered and were available in pad form to all employees, including Segarra, whose duties included signing delivery orders on shipments other than commercial shipments such as that involved here.

33. Prior to employing Segarra, Penson investigated his background, although no inquiry was made of Segarra's prior employment by a competitor customs broker, as it was a general practice in the trade not to inquire of former customs-broker employers since favorable reports on former employees were not given as a matter of practice. Prior to November 1957, Segarra had been in Penson's employ approximately two or three years and there was no reason to suspect him of any improper conduct and he had handled valuable shipments prior to this incident. None of the employees were bonded.

34. In 1957, approximately twelve people at Penson were authorized to sign delivery orders. No notice was given to the pier when such an employee left Penson's employ.

35. In 1957, Penson employed approximately five or six different over-the-road trucking firms.

36. Since 1960, Penson has employed an impression seal on their delivery orders and has informed the steam-

ship companies and the stevedores not to honor any Penson delivery orders which do not have Penson's impression seal on them.

37. It was not customary at any of the piers for the pier personnel to require personal indentification of the driver or to ask to see the registration for the truck.

38. The contract between Clark and Cunard provided:

> "The Contractor [Clark] shall:
>
> * * *
>
> "(ii) Provide efficient clerking and checking services both in respect to the receiving of cargo for loading and the delivery of cargo after discharge.
>
> * * *
>
> "(xxv) As terminal employees, engaged in clerical services of tallying and delivery of cargo, are selected so far as possible according to their integrity and ability, the Contractor cannot assume responsibility for losses resulting from possible theft or errors in delivery or receiving of cargo except where fraud on the part of those employees is clearly evident. However, the Contractor will indemnify and save harmless Agent [Cunard] against any and all cargo claims caused by theft or pilferage when such cargo is placed in the permanent pier cribs in the care, custody and control of the Contractor, and/or the care, custody and control of any protective organization engaged by Agent * * *." (Lib. Ex. 4)

39. The bill of lading pertaining to this shipment contained the following clauses:

" * * Package(s) Merchandise to be delivered, day or night, subject to the exceptions, restrictions and conditions of the undermentioned clauses, from the Ship's Deck where the Shipowner's responsibility shall cease, in the like good order and condition at the Port of New York. * *

"The Goods to be received by the consignees immediately the vessel is ready to discharge or otherwise they may be landed on the wharf or quay or at the option of the Master or the Ship's Agent they will be landed and stored at the sole expense and risk of Consignee in the Warehouses provided for that purpose, or in the Public Store, as the Collector for the Port of Discharge shall direct, and when deposited in the Public Store to be subject to rent; and the keys of the Warehouse to be delivered to and kept in charge of the Officer of Customs under the direction of the Collector, the Collector of the Port being hereby authorized to grant a general order for discharging immediately after the entry of the ship."

"The Act of God * * * Thieves * * * Pilferage * * * always excepted. * * *

"Notwithstanding anything to the contrary contained in this Bill of Lading it is mutually agreed that the carrier is not liable in any case for more than the consular or foreign invoice value and that the value of each package shipped hereunder does not exceed £20 or its equivalent in American Currency on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum per package or relatively for any proportion thereof, unless a value in excess thereof and true nature thereof be specially declared and stated herein and extra freight as may be agreed on paid. . . ." (Lib. Ex. 1)

40. Penson in its procedure on this shipment followed its own established procedure and the customary procedure for customs brokers in the handling of inward shipments.

41. The procedure followed by Cunard in respect to this shipment is the procedure customarily followed by carriers in allowing the stevedore to unload and deliver inward shipments in the shipping industry.

42. The procedure followed by Clark with respect to this shipment is the procedure customarily followed by the stevedoring industry.

Discussion

A single sentence suffices to express the essential facts in this case: The cargo in question was discharged from Cunard's vessel to the pier by Clark, the stevedore, and from there misdelivered by Clark upon the presentation of a forged delivery order of the customs broker, Penson, obtained by the thieves through the complicity of one of Penson's employees. While pilferage on the New York docks is not new, the cool assurance with which the conspirators completed the necessary formalities and waited at the pier almost nine hours until the cargo was finally loaded aboard their truck, gives some indication that this was a masterly executed plot to obtain the cargo by persons more than casually familiar with the procedures of the piers and the customs brokers. The question for this court is, who, among the four parties involved, bears the brunt of that loss.

Opinion, Findings of Fact and Conclusions of Law of District Court

I.

At the outset is the question of Cunard's liability. It was undisputed at the trial that the misdelivery occurred after the cargo had been discharged from the vessel in the same good order and condition, segregated on the pier by the stevedore, and notice given to the consignee of the time and place of the delivery.

The bill of lading provides:

> "Packages merchandise to be delivered subject to the exceptions, restrictions and conditions of the undermentioned clauses, from the ship's deck where the Shipowner's responsibility shall cease * * *.
>
> * * *
>
> "The Goods to be received by the consignee immediately the vesssel is ready to discharge or otherwise they may be landed on the wharf or quay or at the option of the Master or the Ship's Agent they will be landed and stored at the sole expense and risk of Consignee in the warehouses provided for that purpose * * *."

Were a literal reading of the bill of lading permitted, the case would clearly come to a swift end in favor of the carrier. But so easy a solution is not possible. Notwithstanding its own terms, the bill of lading was potentially subject to overriding statutory provisions of the Carriage of Goods by Sea Act (COGSA), 46 USC § 1300 et seq, and the Harter Act, 46 USC § 190 et seq. The first question then is whether the provisions of the bill of lading are to be altered by the force of statute.

As the cargo had been discharged from the ship, the

terms of the bill of lading were no longer subject to COGSA, whose coverage is statutorily defined to embrace the period, in foreign commerce, "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 USC § 1301(e). Similarly, the bill of lading was no longer subject to the Harter Act, 46 USC § 190, which is applicable to the period between the discharge of the cargo and its "proper delivery." *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*, 318 F. 2d 720 (2 Cir. 1963); Gilmore & Black, The Law of Admiralty 126 (1957). While the Harter Act contains no statutory definition of the term "proper delivery," the courts have held that, in the absence of port customs and regulations to the contrary, "proper delivery" constitutes delivery at a fit and customary wharf. *Isthmian S.S. Co.* v. *California Spray-Chemical Corp.*, 290 F. 2d 486 (9 Cir. 1961), affirmance adhered to on rehearing, 300 F. 2d 41 (1962); *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*, supra; *Tau Hi* v. *United States*, 94 F. Supp. 432 (N.D. Cal. 1950). No contrary port custom or regulation was established in this case and, by its own terms, the contract of affreightment expressed in the bill of lading came to an end when the goods were discharged onto the pier, segregated by the stevedore, and notice given to the consignee of the time and place of delivery. Cf. *Constable* v. *National S.S. Co.*, 154 U.S. 51 (1894); *The Eddy*, 5 Wall. 481 (1886); *The Titania*, 131 Fed. 229 (2 Cir. 1904). And thereafter, "[u]ntil receipt by the consignee, the carrier, despite any terms to the contrary in its bill of lading, continues to hold goods unloaded by it as a bailee. Or, as some cases have put it, where, by the terms of the bill of lading, the contract of carriage terminates on discharge of the cargo from the ship, its liability changes from that of a common

carrier to that of a warehouseman, * * *." *Standards Brands Inc.* v. *Nippon Yusen Kaisha*, 42 F. Supp. 43, 44 (D. Mass. 1941). See also, *The Italia*, 187 Fed. 113 (2 Cir. 1911).

II.

At the time the goods were delivered to the impostors, Cunard was no longer in physical possession of them, having chosen, without notice to the consignee, to allow Clark, its stevedore, to come into physical possession of the cargo and to serve in Cunard's stead. As was stipulated at the trial, Clark undertook to deliver the cargo unloaded from the SS Treylon to the named consignee in the bill of lading upon receiving advice from Cunard that all freight charges had been paid. The stevedore was "an agent selected by the carrier to carry out the carrier's obligation to safely deliver and discharge the cargo as required by its contract with the shipper." *A. M. Collins & Co.* v. *Panama R. Co.*, 197 F. 2d 893, 896 (5 Cir. 1952). Cf. *The Ben Adams*, 3 Fed. Cas. 155 (No. 1289) (D.C.S.D.N.Y. 1868), where a clerk hired by the carrier misdelivered the cargo.

Cunard argues that Clark is an independent contractor and that it is not vicariously liable for Clark's actions under the circumstances in this case. It relies primarily on two cases, *The Satilla*, 235 Fed. 58 (2 Cir. 1916) and *The Teno*, 47 F. 2d 197 (2 Cir. 1931). The crucial distinction between those cases and the present situation is that here a bailment is involved and "the rule is well settled that a bailee for hire is responsible for the proper care, not only by himself but by anyone to whom he entrusts it and it makes no difference whether that other is

an independent contractor or not." *Taylor* v. *United States*, 66 F. Supp. 231, 233 (E.D. Pa. 1946). Accordingly, Cunard stands vicariously liable for the actions of Clark and whatever standard of care is imposed upon Cunard, after its contract of affreightment came to an end, devolves upon Clark.

III.

Cunard's liability as a carrier had ceased and both it and its agent Clark stood as warehouseman in relation to the cargo. The question becomes, what is the liability of a carrier, as warehouseman, for a delivery of the goods to the wrong person.

The libellant argues that a warehouseman is absolutely liable for a misdelivery without any question as to his negligence, relying in the main on New York cases. Cunard and Clark argue that as Cunard's liability as carrier had ceased, their duty thereafter was only to exercise ordinary care for the protection of the goods and they are not liable for misdelivery in the absence of proof that they were negligent. The respondents rely upon such cases as *The Bellingham*, 57 F. 2d 1015 (3 Cir. 1932) and *North Amer. Smelting Co.* v. *Moller S. S. Co.*, 204 F. 2d 384 (3 Cir. 1953). These cases, and many more, unquestionably stand for the proposition that the duty of a carrier, as warehouseman, is to exercise ordinary care for the protection of the goods. However, in none of these cases, was a *misdelivery* involved. The goods in question here were lost by reason of a misdelivery, and not by reason of a theft or burglary. While the law in the admiralty is clear that a warehouseman's liability for property stolen or lost through fire or some misadventure other than mis-

delivery is only for negligence, *North Amer. Smelting Co.* v. *Moller S.S. Co., supra* (theft); *Standard Brands Inc.* v. *Nippon Yusen Kaisha, supra* and *The Italia, supra* (cargo damage by water), there is no direct precedent in admiralty establishing the standard by which a carrier, as warehouseman, is to be judged for a misdelivery of cargo after the termination of the contract of carriage. The lacuna is somewhat surprising. The court has been able to find only two reported cases in admiralty discussing the liability of a carrier as warehouseman for misdelivery after the contract of carriage terminated, and in each the standard is by no means clear. These are *MacAndrews & Forbes Co.* v. *United States*, 23 F. 2d 667 (3 Cir. 1928) and *Julius Klugman's Sons, Inc.* v. *United States Lines Operators, Inc.*, 1935 AMC 1514 (S.D.N.Y. 1935).[1]

In *MacAndrews*, suit was brought against the ocean carrier to recover the value of certain fox skins which respondent's vessel failed to deliver to the consignees in New York. The consignees employed a customs broker to arrange for entry of the shipment and delivery to them. The customs broker hired a trucking firm, and gave the firm a signed delivery order directing the carrier to deliver the goods to the truckman. The trucker left the delivery order in an unlocked drawer of a desk in a public garage where it was to await a pick-up by the firm's driver. A thief abstracted the delivery order and pre-

[1] There is possibly a third case, *Strohmeyer & Arpe Co.* v. *American Lines S.S. Corp.*, not reported either officially or unofficially, but summarized in 1935 AMC 1005 (S.D.N.Y. 1935). From that summary the facts appear to be that the goods were stolen from a pier by a conspiracy between the driver of the delivery truck employed by libellant and a receiving clerk employed by respondent. The clerk gave false passes enabling the truckman to leave the pier with some of the cases which he had delivered there. The respondent was held liable.

sented the stolen order to the carrier's delivery clerk and received and made off with the goods. The court held the carrier not negligent in honoring the valid delivery order presented by the thief, that the negligence was upon the libellant's agent, and as between the innocent carrier and consignee, the loss should fall on the latter. The case of *Julius Klugman* involved the theft of the cargo from the pier by means of an altered or incorrect gate pass. The court held, "It is clearly established that as a result of negligence, if not worse, on the part of employees of both United [pier owner] and Jarka [stevedore], a thieving truckman was able to enter the gate, obtain possession of the furs, pass checkers, the delivery clerk and the watchman, pass through the gate again, and drive away with the furs." 1935 AMC at 1519.

The only other authority in admiralty which the court has been able to find is a statement in *The Santee*, 21 Fed. Cas. 411 (No. 12,328) (D.C.S.D.N.Y. 1868), aff'd 21 Fed. Cas. 414 (No. 12,330) (C.C.S.D.N.Y. 1870) to the effect that the carrier, after termination of the contract of carriage, remains "responsible for the value of the goods if he delivers them to the wrong person, even though by mistake or imposition," although the case itself was decided on another ground. In addition, there are two cases in the New York Court of Appeals where, in applying maritime law, an ocean carrier was held liable for a negligent delivery, *Collins* v. *Burns*, 63 N.Y. 1 (1875) and *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N.Y. 170 (1888).

In none of these cases can it fairly be said that the only standard applicable to the carrier as warehouseman is that of reasonable care, for these cases, properly construed, support the proposition that if the carrier, as warehouseman, negligently delivers the goods to the wrong person, it is liable for the loss. On the other hand, the law pre-

vailing on the land is almost uniformly to the effect that a warehouseman is absolutely liable for a misdelivery.

It should first be pointed out that New York law is in no way wise controlling. The libellant's claim for non-delivery on the ocean contract of affreightment is to be governed by the general maritime law. This would be true even were the jurisdictional basis of the libel other than this court's admiralty jurisdiction. If the maritime law recognizes a claim, it could not be defeated by a contrary New York rule. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). However, this does not mean that lacking a clear precedent in admiralty resort to the law prevailing on the land is without benefit. "Maritime law draws on many sources; when there is no clear precedents in the law of the sea, admiralty judges often look to the law prevailing on the land. * * *" *Igneri* v. *Cie De Transports Oceaniques*, 2 Cir., No. 27801, September 18, 1963. If the law prevailing in the states, uniformly or nearly so, were to impose a standard other than reasonable care for misdelivery by a warehouseman, "a United States admiralty court would approach the problem here by asking itself why it should not likewise do so." *Igneri, supra.*

It was early held in New York that a carrier, as warehouseman, was liable for misdelivery even though the result of an honest mistake on its part. In *Bank of Oswego* v. *Doyle*, 91 N.Y. 32 (1883) the plaintiff sought to recover for the non-delivery of a cargo of wheat which the defendants, as common carriers, had transported over water from Toledo to Oswego. The cargo remained aboard the schooner after mooring and from there, placed, without the plaintiff's consent, in a grain elevator. The defendants argued that their liability as carriers had ceased and that they remained liable as bailees and warehouse-

man. In rejecting this contention the court said, 91 N.Y. at 42: "Warehouseman are [sic] not only liable for losses occasioned by their negligence, but for those which arise from innocent mistakes in the delivery of goods to persons not entitled to receive them." The same result was had in *Security Trust Co.* v. *Wells, Fargo & Co.*, 81 App. Div. 426 (1903), aff'd on the opinion below, 178 N.Y. 620 (1904). There, an express company sought to escape liability for misdelivery by claiming the status of warehouseman. In rejecting the contention that the express company stood as warehouseman, the court held, 81 App. Div. at 430: "Nor would it benefit the defendant if the liability were that of a warehouseman or of an involuntary bailee, for the wrongdoing consisted in the affirmative act of delivering the goods to a person not the consignee." Similarly, in *Strong* v. *Security Storage & Warehouse Co.*, 108 Misc. 329, 332, 177 N.Y.S. 591 (Sup. Ct.), aff'd 190 App. Div. 930, 179 N.Y.S. 953 (1919), it was held: "'A warehouseman is liable for conversion of property stored if, without authority, he delivers it either negligently, intentionally or by mistake to one not entitled to it, and he is liable, although the mistake was not due to want of ordinary care and prudence on his part.'"

The law in other states is in complete accord. In *Cleveland C.C. & St. L. Ry.* v. *Wright*, 25 Ind. App. 525, 58 N.E. 559 (1900) a railroad which had voluntarily delivered the goods of another to a wrong person, was held liable either as a common carrier or warehouseman for the loss, without regard to the question of negligence. Similarly, in *Shank Fireproof Warehouse Co.* v. *Harian*, 108 Ind. App. 592, 29 N.E. 2d 1003, 1005 (1940) the court stated:

"'Indeed, for such delivery to a wrong person, not

upon compulsion by legal process, but voluntarily, though through mistake, either a common carrier or a warehouseman would be responsible as for conversion, without regard to any question of negligence.'"

To the same effect see *Terminal Warehouse & Refrig. Co. v. Cross Transp. Co.*, 33 A. 2d 617 (D.C. Munic. Ct. App. 1943). For a collection of authorities see 1 Harper & Jones, Torts 156 (1956).

Much of the law in this area is now statuory, being governed either by the Uniform Warehouse Receipts Act (UWRA) or the Uniform Bill of Lading Act (UBLA). UWRA, promulgated by the National Conference on Uniform Laws in 1906, has been enacted in every state, the District of Columbia, the Virgin Islands, Puerto R. and the Panama Canal Zone, see 3 Uniform Laws Ann. The UBLA, promulgated in 1909, has been enacted in 31 states and has been superseded for interstate shipments and foreign exports by the Federal Bills of Lading Act, 39 Stat. 538 (1916), as amended, 49 USC §§ 81–124 (1948) which, for the most part, is identical to the UBLA.

Section 10 of UWRA provides:

"Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either:

"(a) Been requested, by or on behalf of the person

lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

"(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods."

Subdivisions (b) and (c) of Section 9 provide:

"(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or

"(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been endorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee."

Similar provisions are contained in Section 13 of UBLA and Section 10 of the Federal Bill of Lading Act.

Under these uniform acts, a carrier or warehouseman has been held absolutely liable for delivery to the wrong person, even where, as here, the bailee relied upon a skillfully forged delivery order. Thus, in *Adel Precision Prod. Corp.* v. *Grand Trunk W. R.R.*, 332 Mich. 519, 51 N.W. 2d 922, cert. denied 344 U.S. 831 (1952), a carrier was held liable under the Federal Bill of Lading Act although he made delivery on a forged indorsement on the bill of lading. Similarly, in *Freedman* v. *George W. Bush & Sons Co.*, 284 Pa. 16, 130 Atl. 263 (1925), a carrier who delivered on a forged order was held liable, the court stating:

> "'Whatever doubt may hang over other questions as to the termination of a carrier's or other bailee's responsibility, there is one point which is indisputable, that he must take care at his peril that the goods are delivered to the right person, for a delivery to a wrong person renders him clearly responsible * * * though innocently and by mistake, as when it is made upon a forged order.'"

The same result would follow under Article 7 of the Uniform Commercial Code, which has been adopted in 18 states, see 1 Anderson, Uniform Commercial Code vii (1961) and 1962 Supp. As Professor Braucher of Harvard states, "Delivery to the wrong person, under the Code as under prior law, would seem to subject the bailee to an absolute liability to the person entitled under the document, even though, for example, the bailee relied on a skillfully forged delivery order." Braucher, Documents of Title Under the Uniform Commercial Code 32 (1958).

There is, however, an important caveat which prevents the strick application of these uniform acts to the case at bar. The delivery order of Penson upon which Clark made delivery is certainly not a warehouse receipt as that term is defined in Section 2 of UWRA or Section 1-201(45) of the UCC. Similarly, the delivery order is not a bill of lading under either Act. While delivery orders, dock warrants and dock receipts were not covered under either UWRA or UBLA, the Uniform Commercial Code expressly includes them.

Section 1-201(15) defines document of title as including "bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequatley evidencing that the

person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass." It is extremely doubtful that Lib. Ex. 5, the forged delivery order, would be a document of title as defined since it can hardly be said of it that "in the regular course of business or financing [it] is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers."

Perhaps the rule which is most appropriate to be adopted as the general maritime law is that stated in Restatement, Torts § 234 (1934):

> "A bailee who delivers a chattel to one not entitled to its immediate possesion is liable to the bailor for a conversion of the chattel, unless
>
> "(a) the bailor has given the bailee reason to believe that the person to whom the chattel is delivered is entitled thereto, or
>
> "(b) the bailee is otherwise privileged to make the delivery."

As comment (b) makes clear, the rule applies to carriers and warehouseman and, as expressed in (e), with but a minor exception not relevant here, the rule is that prevailing under the UBLA and UWRA. The rule makes a bailee liable who, through mistake or otherwise, delivers a chattel to a person not entitled to receive it, unless the bailee has been directed to deliver it to such person by his bailor or unless his mistake as to the person entitled to receive the chattel has been induced by the bailor. The

requirement that the bailee is relieved from liability where the mistake was induced by the bailor accords with both admiralty and the law of the states and is often spoken of as estoppel by negligence. See *MacAndrews & Forbes Co.* v. *United States*, 23 F. 2d 667 (3 Cir. 1928); *Salomon Stern, Ltd.* v. *Davis*, 292 Fed. 221 (S.D.N.Y. 1923); *Terminal Warehouse & Refrigeration Co.* v. *Cross Transp. Co.*, 33 A. 2d 617 (D.C. Munic. Ct. App. 1943); *Kramer* v. *Haeger Storage Warehouse Co.*, 123 App. Div. 316, 108 N.Y.S. 1 (1908); *Phillipson & Co.* v. *Grand Trunk W. Ry.*, 238 Ill. App. 251 (1925).

In the face of this overwhelming weight of authority and the lack of a clear precedent in admiralty, the question becomes whether a United States admiralty court should not do as all on land have done. No adequate reason appears why the rule in admiralty concerning the misdelivery by a carrier, as warehouseman, should not be that stated in the Restatement, the UWRA, the UBLA and the UCC. The necessity of uniformity and the dictates of the certainty of commercial transactions permit no other result. "Certainly in the law governing commercial transactions of this kind is an overriding consideration * * *." *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697, 698 (1963) (Harlan, J. dissenting). The vitalness of the storage and shipment of billions of dollars of merchandise through United States ports annually requires that no distinction exist between the law on the docks and that on the land. The law governing this case is that expressed in the Restatement, Torts § 234 (1934), which itself embodies the modern thought on the subject as set forth in the uniform acts.

IV.

There is no question that Clark as Cunard's agent misdelivered the cargo. The question under the rule just adopted is whether that mistake was induced by the libellant or those acting in its behalf. Crystal itself was guilty of no act or conduct which would bar it from recovery and argues that it cannot be held responsible for the acts of Penson. Penson was acting as Crystal's customs broker with respect to the shipment. Any contention by Crystal that it should not be held responsible for Penson's action is effectively disposed of by the *Mac Andrews* case, supra. There, the libellant employed a firm of custom house brokers to arrange for entry of the shipment and delivery to them. The court found the brokers negligent, thus barring a recovery to the libellant, stating: "In that regard we are clear, as was the Court below, that the fraud was made possible by those acting for the plaintiffs." 23 F. 2d at 667. See also *Salomon Stern*, supra. Unquestionably, Crystal stands responsible for the acts of Penson.

If Penson were to be found to have induced Clark's mistake, it would be a complete bar to any recovery by the libellant. There is no rule in cargo damage cases which requires the damages to be either equally apportioned among the parties negligent as in mutual fault collision cases, *The Catherine*, 58 U.S. 170 (1854), but see *N. M. Paterson & Sons, Ltd.* v. *Chicago*, 209 F. Supp. 576 (E.D. Ill. 1962) or to be proportioned among the parties at fault as in maritime personal injury cases, *The Max Morris*, 137 U.S. 1 (1890). In cargo damage cases, there is "no rule of law which would permit a determination of liability upon the basis of the calculation of a certain percentage of due care or the calculation of non-exercise of

due care, percentage wise." *Tri-Valley Packing Ass'n* v. *States Marine Corp.*, 310 F. 2d 891, 392 (9 Cir. 1962).

The question then narrows itself as to whether any of Penson's acts gave Clark reason to believe that the delivery was proper. It was unquestioned that Segarra, one of Penson's employees, was engaged in a criminal conspiracy to effectuate the theft of the cargo. Much was bruited about at the trial and in the briefs about the practices of Penson in failing to secure the completed delivery orders and the method of permitting truckers to come into the office to pick up completed delivery orders. Even assuming, without deciding that Penson was negligent in this respect, it is difficult to see how this could have been the proximate cause of the loss. Segarra as an employee would have had access to most of the office, even had the delivery orders been secured. There is nothing to indicate that Segarra's abstraction of the original delivery order could have been prevented by reasonable office procedures and whatever negligence there may have been in the procedure did not result in the loss in question.

There is nothing in the record to indicate that Penson was in any way negligent in either initially hiring Segarra or retaining him in its employ. Prior to the theft in question, he had given no indication as to his criminal propensity. "An employer is not bound to assume that an employee, whom he has no reason to suspect of dishonesty, will or may commit a crime. On the contrary, the presumption is that he will do right and not wrong." *Ehrich* v. *Guaranty Trust Co.*, 194 App. Div. 658, 664, 186 N.Y.S. 103 (1921), aff'd 233 N.Y. 637 (1922).

The real issue is whether Segarra's acts were within the scope of his employment. Segarra's duties in 1957 included the signing of delivery orders on in bond ship-

ments, but not on commercial shipments such as that involved here. His duties also included the giving of completed delivery orders to truckers who came to call for them at Penson's office. While the question is not without some doubt, it would appear that Segarra's acts were outside the scope of his employment. In *Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349 (1929), an employee, authorized by his duties to give notice of arrival of shipments, falsely notified the plaintiff, for his own benefit in the successful pursuance of a scheme to defraud, that a shipment had arrived. In reliance on this false information, the plaintiff expended funds which later he sought to recover. The Supreme Court held the employer railroad liable, holding that "the liability of the principal for the false statement or other misconduct of the agent acting within the scope of his authority is unaffected by his secret purpose or motives." 278 U.S. at 356. The crucial distinction between the *Gleason* case and the present situation is that Segarra had no authority to sign delivery orders in commercial shipments, such as the one in question here. If he had, the *Gleason* case would unquestionably be controlling. The mere fact that Segarra was acting for his own corrupt purposes does not place the act outside his employment. See Restatement (Second), Agency § 236 (1958). What is controlling is that his act of abstracting the valid delivery order from Perez' desk was not within the scope of his employment.

Furthermore, the document which Segarra abstracted was not the one used to obtain delivery. It is unquestioned that Clark made delivery on a forged order. The bank which Segarra also abstracted was, beyond doubt, an incomplete instrument. Only the intervening criminality of the co-conspirators gave some life, albeit abortive, to the document. In *Ehrich* v. *Guaranty Trust Co., supra*, the

defendant was the transfer agent of a corporation and in that capacity held certificate books which had been signed by the corporate officers but which required the countersignature of the transfer agent to be valid. The defendant employed a clerk whose previous history showed no criminal propensity. The clerk, while working alone at night, abstracted ten certificates from the books, forged the defendant's signature and used them as collateral with the plaintiff in a trading account. Several years later, when the forgeries were discovered, the plaintiff sought to recover his loss from the defendant. The court found that the defendant had not been negligent, holding, 194 App. Div. at 661:

> "These forged certificates when taken from the certificate book by Goodwin were not complete instruments. They had been sealed by the gas light company and signed by its proper officers. To make them completed instruments they still required the signatures of the transfer agent and the registrar of transfers. They never became completed instruments as those signatures were never affixed to them. The boy Goodwin had not authority to affix those signatures to the certificates and his act in so doing was a crime."

The invalidity of the delivery order here distinguishes the case at bar from both the *MacAndrews* and *Salomon Stern* cases.

The libellant is not estopped from asserting its claim for the loss because of any acts by Penson and is entitled to a decree in its favor against the respondent-petitioner. Cunard seeks to limit its liability to $500.00 per package under COSCA or to £20, as set forth in the bill of lading. Since neither COSCA nor the bill of lading was

applicable at the time of the misdelivery, Cunard cannot avail itself of either limitation clause and stands liable for the full value of the libellant's loss. Cf. *Oliver Straw Goods Corp.* v. *Osaka Shosen Kaisha*, 47 F. 2d 878 (2 Cir.), cert. denied, 283 U.S. 856 (1931); *The Bellingham*, 49 F. 2d 442 (D.N.J. 1931), rev'd on other grounds 57 F. 2d 1015 (3 Cir. 1932). As it was Clark who actually made the misdelivery, it can hardly be doubted that Clark breached both the express and implied warranties of its stevedoring contract. Cunard is, therefore, entitled to a decree awarding it indemnification from Clark under Admiralty Rule 56.

V.

In view of the foregoing there is no need to consider the direct claim of *Crystal* against *Clark*. There remain, however, the claims against Penson asserted in Clark's impleading petition and in Crystal's amended libel. Penson was originally brought into this suit by Clark's impleading petition pursuant to Admiralty Rule 56. Crystal asserted no direct claim against Penson until after the trial when it filed its amended libel. When exceptions and exceptive allegations were taken against the amended libel, the court, as is its duty, *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U.S. 379 (1884), questioned the jurisdictional basis of the direct claim against Penson as well as that of Clark's impleading petition.[2] At that time, decision on these jurisdictional

[2] No jurisdictional questions seem to be presented by either the libel against Cunard, *The Eddy*, 5 Wal. 481 (1886), *North Amer. Smelting Co.* v. *Moller S.S. Co.*, 204 F. 2d 384 (3 Cir. 1953), or Cunard's impleading petition against Clark based on the allegation of Clark's breach of its stevedoring contract, concededly a maritime contract, *American Stevedores Inc.* v. *Porello*, 330 U.S. 446 (1947). In any event, both could be supported by diversity of citizenship, 28 USC § 1332.

questions was reserved and the parties, at the court's request, have briefed the issues in their post-trial memoranda.

It is black letter law in this circuit that an impleading petition under Admiralty Rule 56 must present at least federal, and possibly also admiralty jurisdiction over the impleaded party regardless of whether the impleaded party is asserted to be directly liable to the libellant or whether liability over is claimed. *The Lake Galera*, 60 F. 2d 876 (2 Cir. 1932), cert denied sub nom. *Jamison* v. *United States*, 287 U.S. 670 (1933); *Aktieselskabet Fido* v. *Lloyd Brasiliero*, 283 Fed. 62 (2 Cir.), cert. denied 260 U.S. 737 (1922); *The Goyaz*, 281 Fed. 259 (S.D.N.Y. 1922), aff'd 3 F. 2d 533 (2 Cir. 1924), cert. denied 267 U.S. 594 (1925); *Rudy-Patrick Seed Co.* v. *Kokusai Kisen Kabushiki Kaisha*, 1 F. Supp. 266 (S.D.N.Y. 1932). Cf. *Soderberg* v. *Atlantic Lighterage Corp.*, 19 F. 2d 286, 287 (2 Cir.), cert. denied 275 U.S. 542 (1927). The rule is best expressed in 3 Moore, Federal Practice § 14.25 at 491 (2 ed. 1948):

> "In admiralty, the rule has been that the impleading petitioner should set forth either (a) a cause of action at least within federal (and possibly also within admiralty) jurisdiction between the impleaded party and the libellant, or (b) a claim for indemnity against the impleaded party and in favor of the petitioner which comes at least within federal (and possibly also within admiralty) jurisdiction. * * *"

Clark's claims against Penson cannot be premised on diversity of citizenship. 28 USC § 1332. Clark is a New York corporation. Penson is a partnership composed of Jack Penson, Harvey Penson and Louis Penson. For purposes of diversity of citizenship, a partnership has the citizenship of the individual partners. *Great Southern*

Fire Proof Hotel Co. v. *Jones*, 177 U.S. 449 (1900); *Grant County Deposit Bank* v. *McCampbell*, 194 F. 2d 469 (6 Cir. 1952); *Eastern Metals Corp.* v. *Martin*, 191 F. Supp. 245 (S.D.N.Y. 1960). There is nothing in the pleadings or the record to indicate the citizenship of the individual partners. The burden to prove jurisdiction is, of course, on the party invoking it, *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936), and for failure to establish diverse citizenship Clark cannot premise its action upon it. In view of the lack of diverse citizenship, there is no necessity to determine whether any basis of federal jurisdiction will suffice under Admiralty Rule 56. "It is not necessary here to determine whether the District Court could introduce such a controversy though it was not of admiralty jurisdiction, if it was within some one of its other grants of jurisdiction." *Soderberg* v. *Atlantic Lighterage Corp.*, 19 F. 2d 286, 287 (2 Cir.), cert. denied 275 U.S. 542 (1927) (L. Hand, *J.*).

Since Clark's impleading petition seeks "full liability over * * * and indemnity," the issue narrows itself to whether Clark's claim of indemnity based on "fault, carelessness, negligence and breach of [Penson's] obligations and duties" is cognizable in admiralty. The basis of the claim would seem to be that Penson by its actions committed a maritime tort.

The critical factor in determining whether a tort claim comes within the statutory grant of admiralty jurisdiction is the situs of the tort, i.e., the place where it happened.(3)

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3 The test is very different from that applicable in respect to contract claims. "In determining whether a contract be of maritime nature, locality is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done. * * * In torts the rule is different. There, jurisdiction depends soley upon the place where the tort was committed. * * *" *State Industrial Comm'n* v. *Nordenholt Co.*, 259 U.S. 263, 271 (1922).

If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the court of admiralty. *Weinstein* v. *Eastern Airlines, Inc.*, 316 F. 2d 758 (3 Cir. 1963), petition for cert. filed, 32 U.S.L. Week 3047 (U.S. July 16, 1963) (No. 276). In applying the "locality" test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. The Plymouth, 3 Wall. 20 (1865). Whatever acts of Penson constituted "fault, carelessness, negligence and breach of its obligations and duties," unquestionably occurred in the offices of Penson & Co., 11 Broadway. But even assuming Penson's actions had their impact on the pier from which delivery was made, this would still be insufficient. *LiMandri* v. *Lloyd Brasilliro*, 316 F. 2d 3 (2 Cir. 1963); *The Czechoslovakia Victory*, 76 F. Supp. 808 (S.D.N.Y. 1948). But compare *Marubeni-Iida (America) Inc.* v. *Nippon Yusen Kaisha*, 207 F. Supp. 418 (S.D.N.Y. 1962).[4] The fact that the cargo which is the subject of the alleged negligence was at some time shipped by a carrier over navigable waters is insufficient to confer admiralty jurisdiction. *Schoening* v. *102 Jute Bags*, 132 F. Supp. 561 (E.D.Pa. 1955). In sum, the requisite jurisdiction for Clark's impleading petition cannot here be premised on a maritime tort.

Clark urges that admiralty jurisdiction over Penson can be founded on the fact that Penson was the named consignee in a bill of lading, concededly a maritime contract. There is no question but that the bill of lading is

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[4] No successful contention can be based on the Extension of Admiralty Jurisdiction Act, 46 USC § 740, for the test under that statute is whether "the impact * * * is felt ashore at a time and place not remote from the wrongful act." *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963).

a maritime contract, that a suit for its breach is clearly within admiralty jurisdiction, *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344 (1848), and as named consignee Penson could have brought this suit, *Aunt Jemima Mills Co.* v. *Lloyd Royal Belge*, 34 F. 2d 120 (2 Cir. 1929). But the cause of action asserted by Clark is not premised on the bill of lading and it seems beyond question that in order for jurisdiction to be invoked on this basis, the bill of lading must be its bedrock. In *Armstrong Cork Co.* v. *Farrell Line, Inc.*, 81 F. Supp. 848 (E.D.Pa. 1948) suit was brought in admiralty for damage suffered by goods on land merely because they were held under a "dock receipt," a maritime contract. The court held that the obligations owed the cargo while on the dock were separable from the maritime obligations evidenced by the dock receipt and declined jurisdiction. The fact that Penson here was the named consignee in the bill of lading is not so talismanic as to invoke admiralty jurisdiction over Penson for every cause of action involving in some measure the consignee and the shipment.

Lastly, Clark contends that lacking independent grounds of admiralty jurisdiction, nonetheless, the court may adjudicate Penson's liability under the doctrine of ancillary jurisdiction. Simply stated, that doctrine holds that when federal jurisdiction over the subject matter of the main action once attaches, the court has ancillary jurisdiction to decide a third party dispute growing out of the same core of facts even though the third party claim, separately considered, is lacking in the attributes of federal jurisdiction. *Dery* v. *Wyer*, 265 F. 2d 804 (2 Cir. 1959).[5]

[5] For an extended discussion of the doctrine as developed around the Federal Rules of Civil Procedure, see Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts, 33 F.R.D. 27 (1963) and Note, 62 Colum. L. Rev. 1513 (1962).

Opinion, Findings of Fact and Conclusions of Law of District Court

The development of the doctrine of ancillary jurisdiction has centered about Rule 14(a), Fed. R. Civ. P., which permits a defendant to implead a third party who "is or may be liable to him for all or part of the plaintiff's claim against him." It has uniformly been held that the third-party claim need not provide its own independent basis of jurisdiction, but comes within the court's ancillary jurisdiction. *Waylander-Peterson Co.* v. *Great No. Ry.*, 201 F. 2d 408 (8 Cir. 1953); 1A Barron & Holtzoff, Federal Practice and Procedure § 424 at 650-51 (Rules ed. 1960); 3 Moore, Federal Practice ¶ 14.26 at 496 (2 ed. 1948).

The parties have not cited any case applying the doctrine to an impleading petition under Admiralty Rule 56. The only case which the court has been able to find in which an admiralty court invoked a concept bearing some resemblance to that of ancillary jurisdiction is *Evans* v. *New York & P. S.S. Co.*, 163 Fed. 405 (S.D.N.Y. 1906). There suit was brought in admiralty by the consignee against both the carrier and the pier operator for the non-delivery of merchandise discharged from the vessel to the pier. Judge Hough entered a decree against both respondents, with a direction to collect first from the warehousemen and any amount not so paid to be collected from the steamship company.

> "It seems clear that neither the libelant nor the steamship company could have maintained an original suit in admiralty against the Beards [warehousemen], because the negligence resulting in the disappearance of the rubber from the land warehouse did not give rise to a maritime tort, and neither was the contract between shipowner and warehousemen a maritime contract. Having found, however, that the carrier is responsible to the libelant, the former clearly has his

> remedy over against the warehousemen, and, in order to prevent circuity of action and multiplicity of suits, it would have been, under our practice, competent for the shipper to have petitioned the warehousemen into this proceeding, and, if this could have been done, no reason appears why the warehousemen may not be proceeded against as an original respondent." 163 Fed. at 407.

But the rationale of that case did not long survive. In *The Ada*, 250 Fed. 194 (2 Cir. 1918) Judge Ward repudiated it; Judge Hough dissented from the repudiation; and Judge Rogers withheld his view as unnecessary to the decision. Judge Ward adhered to his view in *The Goyaz*, 281 Fed. 259 (S.D.N.Y. 1922), aff'd 3 F. 2d 533 (2 Cir. 1924) and in *Aktieselskabet Fido* v. *Lloyd Braziliero*, 283 Fed. 62 (2 Cir.), cert. denied 260 U.S. 737 (1922), Judge Rogers, who had refrained in *The Ada* from expressing an opinion, repudiated the rule of the *Evans* case.

The Seventh Amendment presents a serious obstacle to the transferance of the concept of ancillary jurisdiction as developed under the Federal Rules of Civil Procedure to the admiralty. Rule 38(b), Fed. R. Civ. P., authorizes any party, including an impleaded party, to make a demand for jury trial of any issue so triable. *Bevemet Metais Ltd.* v. *Gallic Corp.*, 3 F.R.D. 352 (S.D.N.Y. 1942); *McAndrews* v. *United States Lines Co.*, 167 F. Supp. 41 (S.D.N.Y. 1958). In *Bevemet Metais*, a fifth-party defendant–sixth-party plaintiff was entitled, upon timely demand, to a jury trial of the issues presented in both the fifth and sixth party complaints. However, in the admiralty, there has traditionally been no constitutional right to trial by jury. *Waring* v. *Clarke*, 5 How. 441, 460 (1847). Thus, if a party whose liability rests on common

law principles is permitted to be impleaded in an admiralty suit without an independent basis of admiralty jurisdiction, the impleaded party has effectively been denied the constitutional right to trial by jury. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935), quoted with approval in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501 (1959). See also *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Simler* v. *Conner*, 372 U.S. 221 1963.[6] There is also a practical consideration. As Professor Moore argues, while the requirement of independent jurisdiction over third-party claims is unworkable on the civil side, it is entirely feasible in admiralty. 3 Moore, Federal Practice ¶ 14.25 (2 ed. 1948). Accordingly, the court lacks jurisdiction over Clark's impleading petition.

There remains the question of the direct claim of Crystal against Penson asserted in the amended libel. The gist of the cause of action asserted against Penson is that it "breached its * * * undertaking and agreement" with Crystal (Par. Twenty-Third, Amended Libel) and that Penson "in wrongfully delivering and making possible said wrongful delivery * * * constituted and amounted to * * * a conversion." (Par. Twenty-Fifth, Amended Libel) Viewing the libel with the liberality which must

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[6] For reasons that would take me too far afield to discuss, the doctrine of pendent jurisdiction is not here applicable, although applicable to admiralty causes of action brought on the law side of the federal courts when joined with a proper claim under the Jones Act, 41 Stat. 1007, 46 USC § 688. See *Romero* v. *International Terminal Oper. Co.*, 358 U.S. 354, 380-81 (1959); cf. *Hurn* v. *Oursler*, 289 U.S. 238 (1933).

be accorded admiralty pleadings, *Archawaki* v. *Hanioti*, 350 U.S. 532 (1956); *Dupont de Nemours & Co.* v. *Vance*, 19 How. 162 (1856); *D'Agosta* v. *Royal Netherlands S.S. Co.*, 301 F. 2d 105 (2 Cir. 1962), the amended libel asserts against Penson a breach of its customs brokerage contract with libellant and a tortious conversion.

Jurisdiction of the libel itself and that of the direct claims is premised on the admiralty and maritime jurisdiction of the court, 28 USC § 1333.[7] In determining whether there is jurisdiction over Crystal's claims against Penson, the inquiries are respectively whether the contract whose breach is alleged is a maritime contract or whether the tort alleged is a maritime tort.[8]

The standards for determining maritime contracts over which the admiralty has jurisdiction are hoary indeed. In *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 392 (1848), the court stated in determining admiralty jurisdiction over contracts the inquiry is "into the nature and subject matter of the contract,—whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the

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[7] Were there another basis of federal jurisdiction it would be unnecessary to decide this question. *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010 (2 Cir. 1931). Crystal's claims against Penson cannot be premised on diversity of citizenship, 28 USC § 1332. Crystal is a New York corporation. As stated at pages 40-41, *supra*, Penson is a co-partnership, but there is nothing in the record to indicate the citizenship of the partners.

[8] Crystal could not seek to assert the doctrine of ancillary jurisdiction in support of its claim against Penson, since, even assuming the doctrine's applicability in admiralty, it has been held not applicable to direct claims by plaintiffs against impleaded third-parties. See, e.g., *Welder* v. *Washington Temperance Ass'n.*, 16 F.R.D. 18 (D. Minn. 1954); 3 Moore, Federal Practice ¶ 14.27[1] (2 ed. 1948); Note, 58 Colum. L. Rev. 532, 542-43 (1958).

sea, or tide waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained." "[I]t is settled that the contract articulated in a libel must be, directly and in essence, an obligation maritime in its nature, for the performance of maritime service or transactions, to confer jurisdiction." *Pacific Surety Co.* v. *Leatham & Smith Towing Co.*, 151 Fed. 440, 443 (7 Cir. 1907). In sum, "[a]dmiralty jurisdiction over contracts is dependent upon the subject matter of the contract." *Weinstein* v. *Eastern Airlines, Inc.*, 316 F. 2d 758, 766 (3 Cir. 1963), petition for cert. filed, 32 U.S.L.Week 3047 (U.S. July 16, 1963) (No. 276). See generally, 1 Benedict, Admiralty § 62, at 127 (6 Ed. 1940).

The court has found no direct precedent holding a customs brokerage contract either within or without the jurisdiction of the admiralty. While admiralty jurisdiction over contracts "will always be a little vague at the borderline, no matter how long the process of judicial inclusion and exclusion goes on,"[9] the periphery of the problem has not gone untouched and by analogy the contours of the jurisdiction would seem to exclude the customs brokerage contract. The following contracts have been held to be not within the admiralty jurisdiction: A contract to procure insurance on a vessel, *Warner* v. *The Bear*, 126 F. Supp. 529 (D.Alaska 1955); a suit by a ship's agent seeking reimbursement of expenses, *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010 (2 Cir. 1931); a contract to act as freight and passenger agents, *The City of Clarksville*, 94 Fed. 201 (D.Ind. 1899), *The Humboldt*, 86 Fed. 351 (D. Wash. 1898); a contract for storage of cargo after dis-

[9] Gilmore & Black, The Law of Admiralty 19 (1957).

charge from the vessel, *Gowanus Storage Co.* v. *United States Shipping Board*, 271 Fed. 528 (E.D.N.Y. 1921).

Certainly the customs broker is employed to perform services which are to some degree connected with ocean carriage. But the contract itself contemplates the performance of services after the cargo has completed its ocean voyage. "The distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow,—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed." *The Thames*, 10 Fed. 848 (S.D.N.Y. 1881).

When placed against this background, the customs brokerage contract, as the shipbuilding contract, is a contract "made on land, to be performed on land," [10] and, accordingly, its breach does not form a basis for admiralty jurisdiction.

The tort of conversion alleged by Crystal against Penson is likewise not within admiralty's jurisdiction. The critical factor in determining whether a tort claim comes within the statutory grant of admiralty jurisdiction is the situs of the tort, i.e., the place where it happened. Whatever acts of Penson constituted "wrongful delivery, and making possible said wrongful delivery * * *" (Par. Twenty-Fifth, Amended Libel) unquestionably occurred

[10] *People's Ferry Co.* v. *Beers*, 20 How. 393, 402 (1858).

in the offices of Penson & Co., 11 Broadway. As has already been seen, even if the acts had their impact on the pier, this still would be insufficient.

Crystal's contention that admiralty jurisdiction over Penson can be founded on Penson's being the consignee has already been effectively disposed of in connection with the identical contention of Clark. Similarly as has already been shown, Penson was improperly impleaded and Crystal cannot premise jurisdiction on the fact that as an impleaded party the libellant could have a decree under Admiralty Rule 56 directly against Penson. Accordingly, this court lacks jurisdiction over the direct claims of Crystal against Penson.

What results is unquestionably somewhat truncated. Yet, "[h]owever desirable it may be that controversies involving a group of litigants, the termination of which rest upon the substantially same operative facts, be disposed of in a single litigation, this Court may not assume jurisdiction unless it exists—it is 'without the judicial power to entertain a cause of action not within its jurisdiction, * * *.'" *Maher* v. *Newtown Creek Towing Co.*, 190 F. Supp. 933, 934-35 (S.D.N.Y. 1961).

Conclusions of Law

1. The court has jurisdiction over the libellant, the respondent-petitioner Cunard and respondent-impleaded petitioner Clark.

2. Libellant Crystal is entitled to an interlocutory decree sustaining its claim for liability against the respondent-petitioner Cunard.

3. The respondent-petitioner Cunard is entitled in said interlocutory decree to a provision sustaining its claim of indemnity against the respondent-impleaded petitioner Clark.

4. The respondent-petitioner's liability is not limited by anything contained in either the bill of lading or the Carriage of Goods by Sea Act.

5. The libellant and the respondent-petitioner Cunard are entitled to a provision in the interlocutory decree for the reference to a Commissioner of the damages to which they are entitled with costs and interest, if any, as determined by this court, upon entry of the final decree herein.

6. The amended libel by Crystal is dismissed as to the respondent-impleaded Penson for lack of jurisdiction but without costs.

7. The impleading petition against Penson by respondent-impleaded petitioner Clark is dismissed for lack of jurisdiction with costs.

Submit interlocutory decree on notice in accordance herewith.

Dated: New York, N. Y.
October 10, 1963.

RICHARD H. LEVET
United States District Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 8—September Term, 1964.

(Argued October 19, 1964 Decided December 9, 1964)

Docket No. 28656

DAVID CRYSTAL, INC.,
Libellant-Appellant-Appellee,

—v.—

THE CUNARD STEAM-SHIP CO. LTD.,
Respondent-Petitioner, Appellant-Appellee,

—and—

JOHN T. CLARK & SON,
Respondent-Impleaded-Petitioner-Appellant-Appellee,

—and—

PENSON & Co.,
Respondent-Impleaded-Appellee.

Before:

FRIENDLY, KAUFMAN and ANDERSON,
Circuit Judges.

Appeal from an interlocutory decree of the United States District Court for the Southern District of New York.

Richard H. Levet, *Judge*, sitting in admiralty, granting David Crystal, Inc. judgment against The Cunard Steam-Ship Co. Ltd., and The Cunard Steam-Ship Co. Ltd. judgment over against John T. Clark & Son, including attorneys' fees and disbursements, denying David Crystal, Inc. recovery against John T. Clark & Son, and dismissing the claims of David Crystal, Inc. and John T. Clark & Son against Penson & Co. for lack of jurisdiction.

Affirmed.

JOHN L. QUINLAN, of Bigham, Englar, Jones & Houston, New York, N. Y., *for libellant-appellant-appellee.*

HENRY C. BLACKISTON, of Lord, Day & Lord, New York, N. Y. (John F. O'Connell, Franklin G. Hunt, on the brief), *for respondent-petitioner-appellant-appellee.*

WILLIAM WEYMAR, JR., of Atkins & Weymar, New York, N. Y. (Joseph B. McDonald, on the brief), *for respondent-impleaded-petitioner-appellant-appellee.*

ENRICO S. SANFILIPPO, New York, N. Y., *for respondent-impleaded-appellee.*

KAUFMAN, *Circuit Judge:*

Our problem on this appeal, not devoid of reticulate aspects, is to determine which one of four parties shall bear the loss for the misdelivery of twenty-eight cases of shirts: the buyer and owner David Crystal, Inc., the carrier Cunard Steam-Ship Co. Ltd., the carrier's stevedore John T. Clark & Son, or the buyer's customs broker Penson &

Co. After a trial in admiralty, the District Court granted Crystal recovery from Cunard and recovery over by Cunard from Clark, but denied Crystal direct recovery from Clark and dismissed Crystal's and Clark's claims against Penson for lack of admiralty jurisdiction. Crystal, Cunard, and Clark appeal from those portions of the decree adversely affecting their respective interests. We uphold the decree placing the ultimate responsibility for the loss upon Clark and find it unnecessary, because of this result, to reach the jurisdictional questions raised by the claims against Penson.

The basic facts may be stated simply enough although the resolution of liability is quite complex. Clark unloaded the shirts from Cunard's vessel to a pier in Brooklyn, N. Y., and then misdelivered them upon the presentation of a forged Penson delivery order, obtained through the complicity of one of Penson's employees.

For a full understanding of the ramifications of this case, however, a further exposition of the facts is in order. On October 31, 1957, Cunard received the shirts purchased by Crystal at Le Havre, France, for shipment aboard its vessel, the SS Treylon. The bill of lading named Penson, Crystal's customs broker, as consignee. On November 14, after Penson received Cunard's arrival notice and obtained clearance from Customs, the file folder relating to the shipment was given to one Jose Perez, its traffic clerk. Perez prepared and signed a delivery order naming a trucker, Arrow Carriers, as agent to accept delivery at the pier. He affixed the order to the outside of the folder and placed it on his desk with other completed orders destined for the outgoing mail basket.

But shortly after Perez performed this task, the chain of events intended to effect proper delivery of the shirts to Crystal was cut at one of its most vital links. It appears that as Perez momentarily left his desk, Louis Segarra, a

fellow employee who had been plotting with outsiders to steal the valued shirts, surreptitiously took the delivery order, together with a blank form. He gave the original and blank orders to Rigley, a confederate, who together with one Orlando, filled out the blank order, inserting the name of a fictitious trucker, C&L Trucking Co., in place of Arrow. They also forged Perez' signature on the new delivery order and destroyed the original.

The next morning Rigley and Orlando appeared at the pier where Clark's stevedores were unloading the Cunard vessel. They presented the forged delivery order to Keane, Clark's chief delivery clerk, and then waited until late in the afternoon while the documents were checked and the shirts loaded on their truck.[1]

Crystal soon discovered its loss and commenced this suit by filing its libel against Cunard for breach of the contract of ocean carriage. Cunard then impleaded Clark seeking indemnity for breach of its stevedoring contract. Clark, in turn, impleaded Penson claiming negligence on its part. Both Clark and Penson answered the libel although Crystal did not assert causes of action against either until amendments to the libel were permitted by the judge upon conclusion of the trial.

The District Court held, as we have already indicated, that Cunard was fully liable to Crystal, but was entitled to be indemnified by Clark. We turn now to examine each phase of that conclusion.

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[1] Although Clark followed customary procedures in delivering the shirts, hindsight indicates that if its employees had been more alert, the conspiracy would have been foiled. For example, although Keane had never before seen a delivery order naming C&L Trucking, he made no inquiry of this and other suspicious circumstances and did not attempt to verify the indecipherable forged signature on the delivery order.

I. *Crystal* v. *Cunard*

Because Crystal's claim against Cunard was for breach of the Contract of ocean carriage, we must look first to the bill of lading to determine the parties' rights and duties. The District Court was of the opinion that the bill of lading became inoperative once the cargo was discharged. We believe, however, that it is more precise to say that although the bill continued to govern the parties' relationships after discharge, its terms did not insulate Cunard from liability. It is true that the bill provided that Cunard's responsibility would cease when delivery was made from the ship's deck and that if the consignee did not immediately receive the goods, Cunard could simply abandon them on the wharf. But these clauses were clearly null and void under the Harter Act's restrictions against certain stipulations seeking to relieve carriers from liability. 46 U. S. C. §190.

The bill of lading also provided that Cunard had the option to land or store the cargo "at the sole expense and risk of Consignee in the Warehouses provided for that purpose." But it is clear that Cunard did not take advantage of that option, for it discharged the goods in the custody of its stevedore on a pier and did not deposit them in a warehouse.

Since the bill of lading did not specify Cunard's obligations when it discharged the shirts to Clark, the law steps in to fill the lacuna; this it does by properly characterizing Cunard's status as a bailee. Cf. *The Italia*, 187 Fed. 113 (2d Cir. 1911); *Standard Brands, Inc.* v. *Nippon Yusen Kaisha*, 42 F. Supp. 42 (D. Mass. 1941). And there is no sound reason to alter its bailee status simply because it landed the shirts on Clark's pier. Absent a valid contract to the contrary, a bailee remains liable for the safety of the goods in whatever hands he may place them; exceptions

that may arise when a consignee fails to accept the goods have no relevance to this case. Cf. *The Eddy*, 72 U. S. 481, 495 (1867).

It is interesting that there is no direct precedent in the law of admiralty establishing the standard of responsibility of a bailee who misdelivers cargo. Because of this void and mindful that maritime law draws on many sources, the able District Court judge in order to shape the appropriate maritime law properly resorted to state decisional law, see 1 Harper & James, Torts 156 (1956), various uniform acts, including the Federal Bills of Lading Act, 49 U. S. C. §§81-124, as well as the Uniform Commercial Code, and finally fastened appropriately on the rule articulated in the Restatement, Torts §234 (1934).

The Restatement rule suggests that a bailee is absolutely liable for misdelivering cargo, unless his mistake as to the person entitled to receive the goods was induced by the bailor. We agree with the District Court that considerations of uniformity and the need for certainty in commercial transactions justified application of this widely accepted rule to maritime transactions. It is not prudent to have a rule which varies a bailee's liability depending upon his proximity to the sea and susceptibility to admiralty's jurisdiction. At the same time, the rule of absolute liability represents a sound allocation of responsibility, for the bailee is in a better position than the bailor to establish procedures to minimize the risk of misdeliveries and to insure against the few misdeliveries that will inevitably occur despite the most careful precautions.

Cunard was therefore absolutely liable for the misdelivery unless (a) certain bill of lading provisions not yet considered eliminated or reduced such liability or (b) the misdelivery was induced by Crystal or Penson, acting in its behalf. One of these provisions, the exception for acts

of "thieve ." seems to us inapplicable because the loss of the cargo here is more appropriately characterized as due to misdelivery rather than theft. It is true that under New York law a taking by false pretenses is larceny, Penal Law §1290, but we do not believe that the broad definition of theft in the criminal law should be extended to a commercial contract. See *Freedman* v. *Geo. W. Bush & Sons Co.*, 284 Pa. 16 (1925). The law already recognizes this distinction for a warehouseman is absolutely liable for misdeliveries but is responsible in trespassory theft cases only where he has been negligent. See *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F. 2d 384 (3d Cir. 1953). These differing standards are based on sound policy considerations since it is proper that a warehouseman should bear a greater responsibility for being duped by false pretenses than for thefts that cannot be avoided despite the exercise of ordinary care.

Cunard's attempt, elsewhere in the bill of lading, to limit its liability to £20 per package also must fail. This clause was clearly void while the goods were at sea, for the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. §1304(5), does not permit limitations under $500. It seems to us that once the law declared this clause void it should remain void forever. It would be unfair to permit the void clause to spring to life once the goods reached land, for by then Crystal had justifiably relied on the clause's inapplicability in making its decision on adequate cargo insurance. Moreover, the limitation provision in the bill of lading does not explicitly cover post-arrival damage. Furthermore, the £20 limitation, when contrasted with COGSA's $500 figure, is such an arbitrarily small sum that it should be void as contrary to public policy. Cf. *Isbrandtsen Co.* v. *United States*, 201 F. 2d 281 (2d Cir. 1953).

We turn, finally, to what is for us the most troublesome question on this phase of the case: whether Crystal is

stopped from recovering because the misdelivery was induced by Penson's alleged negligence. The law is clear that if Penson's negligence caused the misdelivery, Crystal would be barred from recovery. *MacAndrews & Forbes Co.* v. *United States*, 23 F. 2d 667 (3d Cir. 1928). Indeed, the chain of estoppel is firmer and shorter here than in *MacAndrews*, where an owner of furs was estopped from recovering from a carrier by imputing to the owner the negligence of a trucking firm employed by his customs broker. We are not inclined to upset the District Court's holding that Penson could not be faulted for its office procedures or for hiring and retaining Segarra. The key issue on this question is whether Segarra was acting within the scope of his authority when he took the valid delivery order and the blank form from Perez' desk.

As we read the record, Segarra's authority to prepare and sign delivery orders and hand them to truckmen did not extend to the commercial shipment involved in this case. Segarra was allowed to take delivery orders from Perez' desk but only for temporary use in answering inquiries and *not* for delivery to truckmen. While it is true that by trusting Segarra to this limited extent Penson may have facilitated the plot, we are unwilling to stretch the tenuous line of causation and say that Penson "proximately caused" the misdelivery. See *Saugerties Bank* v. *Delaware & Hudson Co.*, 236 N. Y. 425 (1923). Similarly, despite Segarra's authority to take the blank form, it seems clear that this authority did not extend to completing the form; a forgery by a mere custodian of documents is not binding on the principal. See, e.g., *Ehrich* v. *Guaranty Trust Co.*, 194 App. Div. 658, 186 N. Y. Supp. 103 (1921), aff'd, 233 N. Y. 637 (1922); *Manhattan Life Ins. Co.* v. *Forty-Second Street & Grand St. Ferry R.R. Co.*, 139 N. Y. 146 (1893).

A sound reason stands behind our holding that Segarra

was not acting within the scope of his employment in the circumstances present here. If an employer were to be held liable every time an employee took advantage of a general authority to move freely about his offices, he would be placed in the role of an absolute insurer without the ability to protect himself. Instead, the law limits vicarious liability to situations where the wrongdoing can be traced to abuse of a more carefully defined authority. Here, it is clear that Segarra's actions were not sufficiently related to his delegated authority and for that reason Penson cannot be charged with responsibility for the misdelivery.

II. *Cunard* v. *Clark*

We also agree with the District Court's holding that Clark must indemnify Cunard because the misdelivery was a breach of its implied warranty of workmanlike service. The Supreme Court recently indicated, in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), that the implied warranty may be breached even where, as here, there has been no showing of negligence on the stevedore's part. Surely, Clark was in a far better position to prevent the misdelivery than Cunard and liability should properly fall upon the party who is best situated to adopt protective measures.

It is true that Clark's contract with Cunard disclaimed responsibility for "losses resulting from possible theft or errors in delivery." But such disclaimers are not favored by the courts and must be strictly construed. See 2 Harper & James, Torts §28.25 (1956); 78 Harv. L. Rev. 191 (1964); cf. *Pettus* v. *Grace Line, Inc.*, 305 F. 2d 151, 155 (2d Cir. 1962). Somewhat similar considerations of strict construction led us to hold that a theft exception in Cunard's bill of lading, also found in the Clark-Cunard agreement, did

not apply to the facts of this case. And because, as between Cunard and Clark, strong policy considerations favor placing responsibility for the misdelivery on Clark, any attempt to escape from that responsibility should be unequivocally expressed. We are not disposed to extend the agreement's exemption of "errors in deliveries" to "misdeliveries." A "misdelivery" in maritime practice is a technical term of art applied where there is a complete failure to deliver goods to the owner, consignee, or other authorized holder of a bill of lading. Although the term "errors in delivery" is unfamiliar in this context, we are inclined to limit it to delays, incomplete deliveries, or deliveries of the wrong cargo that are ultmately rectified. Indeed, the very novelty of the expression explains our reluctance to treat it as synonymous with "misdeliveries," the term that naturally leaps to mind to characterize what happened here.

We believe Cunard is also entitled to reimbursement from Clark for attorneys' fees and disbursements incurred in defending against Crystal's claim. See *Paliaga* v. *Luckenbach S.S. Co.*, 301 F. 2d 403 (2d Cir. 1962). We cannot accept the stevedore's suggestion that Cunard should be denied recovery because it could have avoided these expenses by asking Clark to defend the action on its behalf. Crystal sued Cunard only and when Cunard impleaded Clark it invoked the personal defenses already discussed against Cunard. Because those defenses were substantial and might have succeeded, Cunard's only safe course was to defend against Crystal's claims. Having forced Cunard into this position, Clark cannot now be heard to say that it should not be charged for litigation expenses unnecessarily incurred.

III. *Crystal* v. *Clark*

In light of the foregoing dispositions, which we have approved, the District Court judge saw no need to consider Crystal's direct claim against Clark, added by post-trial amendment. We recognize that because we affirm Crystal's judgment against Cunard and Cunard's against Clark, the question whether Crystal should be allowed to recover against Clark as well becomes academic. Indeed, because the issue lacks practical significance in this case, we accept without detailed analysis and discussion the authorities that impose jurisdictional obstacles to such direct recovery, see 1 Benedict, Admiralty, § 2, at 2 & n. 4 (6th ed. Knauth 1940); 3 Moore, Federal Practice ¶ 14.20, at 669-70, and ¶ 14.27[1], at 721 & n. 1 (2d ed. 1963), despite our observation that adherence to those precedents often needlessly fragments law suits and might deserve further consideration in the appropriate case.

IV. *Crystal* v. *Penson; Clark* v. *Penson*

In view of the conclusions we have reached, which are founded in part on Penson's freedom from responsibility for the misdelivery, the issues raised by the claims against Penson become wholly academic. Accordingly, we see no need to discuss the District Court's disposition of the jurisdictional problems raised by those claims.

The interlocutory decree is affirmed.

Opinion of Court of Appeals

FRIENDLY, *Circuit Judge* (concurring and dissenting):

I join in the portions of the opinion dealing with the claims of Crystal against Cunard and Clark and with the claims of all three against Penson. But I disagree with the refusal to give effect to what seems entirely clear exculpatory language in the contract between Cunard and Clark.

The full language from the contract we must construe is set out in the margin, Clark being described as "Contractor" and Cunard as "Agent."[1] Endeavoring to put myself in the place of a draftsman not endowed with hindsight, I do not see how he could realistically have been expected to do better in disclaiming liability for the loss that here occurred. Not content to rely solely on bare words of disclaimer, he placed the problem in its business setting. Clark told Cunard that it would try to hire terminal employees of "integrity and ability"; that it would be liable for losses resulting from their lack of integrity; but that it would not be liable for losses resulting from "theft," save as expressly provided in the second sentence, or from "errors"—the latter clearly arising from lack of "ability" of the employees and the former possibly so. Clark would naturally have thought that with this protection it could

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[1] "As terminal employees, engaged in clerical services of tallying and delivery of cargo, are selected so far as possible according to their integrity and ability, the Contractor cannot assume responsibility for losses resulting from possible theft or errors in delivery or receiving of cargo except where fraud on the part of these employees is clearly evident. However, the Contractor will indemnify and save harmless Agent against any and all cargo claims caused by theft or pilferage when such cargo is placed in the permanent pier cribs in the care, custody and control of the Contractor, and/or the care, custody and control of any protective organization engaged by Agent, and provided the Contractor's liability is not in excess of the liability of Agent to shippers, owners or consignees of such cargo, and provided further that Contractor's liability shall not be in excess of two million ($2,000,000.00) dollars. . . ."

rely on the usual fidelity bond against fraud by its employees, on a $2,000,000 liability policy tailored to the risks of theft for which it had accepted responsibility, and on a $2,000,000 policy required by another clause to cover damage to property resulting from its negligence. Other risks remained with Cunard, which would insure or self-insure against them. We now frustrate this well articulated contractual plan and bestow a windfall on Cunard or its insurer because the draftsman did not also use the talismanic word "misdeliveries"—"the term that naturally leaps to mind to characterize what happened here."

I must assume it would have leapt to my brothers' minds, but I doubt it would have to mine. Even after the education from which I have now benefited, "errors in delivery" seems a completely apt way to describe delivery to a wrong person. I fail to understand why, as a matter of language, although deliveries at a wrong time or to a wrong place or other wrong deliveries that are ultimately rectified would be "errors in delivery," unrectified deliveries to a wrong person are not. I am equally unable to comprehend on what basis, especially in view of the explanatory language at the beginning of the clause, Clark should be thought to have been at pains to exclude liability for small errors in delivery, e.g., delays, while accepting liability for large ones, or how Cunard could have reasonably supposed this to be the effect of the words used. If the draftsman had employed a long string of words as was the style a half century ago, omission of the one considered most technically apt might indeed be thought significant; but one good reason for not using ten words where one will do is to prevent argument of that sort.

I likewise see no ground for invoking some artificial rule of construction to cut down on the natural meaning of the words. Whatever may be the case with contracts of adhesion, when a contract is made at arms' length between

two business concerns like Cunard and Clark, there is no justification for courts looking with "disfavor" on the allocation between them of risks from the wrong delivery of cargo on a busy pier; our duty is to read the words, in their setting, with icy neutrality. One of the world's great shipping lines surely does not need the help of this court in working out its contracts, and ought not get it in working out of them. *Pettus* v. *Grace Line, Inc.*, 305 F. 2d 151, 155 (2 Cir. 1962), held that an agreement of a stevedore to be liable for negligence and to carry insurance against it did not negate the implied obligation to perform workmanlike services "in the absence of an express disclaimer"; that decision is not apposite here, and a text discussion of disclaimers on products liability is even less so. To be sure, disclaimers must be clear enough for a reasonable man to understand; but that does not mean that courts ought read them as they used to read indictments, where the omission of any word was fatal.

ANDERSON, *Circuit Judge* (concurring):

I concur in Judge Kaufman's opinion except that on the troublesome question of Clark's liability to Cunard, I reach the same result by a somewhat different approach.

In broad aspect Cunard had a continuing duty, as bailee, until the cargo was delivered to its consignee or the consignee's authorized agent. In contracting to take over the care and custody of the cargo and to deliver it to the consignee or its agent, Clark was fully aware, both from Cunard's purpose in making the contract and from Clark's own position as warehouseman, that it, Clark, was assuming the duties of a bailee. It must further have understood that these duties included delivery of the cargo to the right person, and that it could be held liable for failing to make that delivery even in case the cargo was converted to an-

other's possession through no fault of Clark's. Restatement of Torts, §234. In an arm's length contract Clark and Cunard agreed upon certain exculpatory clauses which limited the aboslute nature of the bailee's liability imposed by law. As such, these clauses must be narrowly construed. 8 Am. Jur. 2d §142.

So regarded, I do not believe that the first sentence of ¶XXV of Clause 3 of the Cunard-Clark contract (printed in Footnote 1 of the dissenting opinion, *supra*) should be interpreted to relieve Clark of the responsibility for the loss of the cargo in this case. That sentence is concerned solely with "possible theft" or "errors in delivery" *caused* by acts of *Clark's employees*. It does not mean that Clark is relieved of responsibility for all losses from theft or all losses from errors in delivery. The *cause* of the loss in this case was a larcey by trick perpetrated by Segarra and his associates. It was not perpetrated by any act or knavery or stupidity on the part of Clark's employees. The employees were duped by Segarra, and the wrong delivery was an innocent mistake. Although the trial court mentioned the fact that Clark's delivery-clerk had never seen a delivery order naming C & L Trucking and couldn't make out the signature on it, the court did not find negligence on the part of Clark's employees. There was no system of filing and comparing signature cards and Clark's procedure throughout was found to be consistent with that customarily followed by the stevedoring industry. At most Clark's employees failed to detect and prevent the trickery of Segarra, *et al.* I do not believe, for example, that if a thief broke into Clark's warehouse to steal merchandise and got away with it, because Clark's watchman was at the crucial moment looking the other way, Clark could escape responsibility on the ground that the theft resulted from the watchman's failure to see the thief.

The trial court found that Clark misdelivered the cargo and was liable for it, not because of the limited ability of its employees to detect larceny by trick or for some negligent act on their part, but because of Clark's absolute liability as a bailee unrelieved by any exculpatory clause of the agreement. The decree of the court below in sustaining Cunard's claim of indemnity against Clark should be affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of December one thousand nine hundred and sixty-four.

Present: HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

DAVID CRYSTAL, INC.,
Libellant-Appellant,

v.

THE CUNARD STEAM-SHIP COMPANY LIMITED,
Respondent-Appellant,

JOHN T. CLARK & SON,
Respondent-Impleaded-Appellant,

HARVEY PENSON, JACK PENSON AND LOUIS PENSON D/B/A PENSON & COMPANY,
Respondent-Impleaded-Appellee.

Docketed as a judgment #67,103 on Feb 9 1965 at 3:29 P.M.

Appeal from the United States District Court for the Southern District of New York.

Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court b and it hereby is affirmed with costs to David Crystal Inc., as Libellant-Appellee, The Cunard Steamship Company Ltd., as petitioner-appellee and the respondent-impleaded-appellee Penson & Company.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk